Supreme Court, U.S.
FILED

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No. 03-643

In the

Supreme Court of the United States

SOLOMON LANGMAN,

Petitioner,

v.

EMANUEL LAUB, JAMES JOHNSON, MEL WEITZ, HAROLD FRIEDMAN, JON GREENFIELD, SAM PELTZ, MANUEL MONACO, HECTOR TORRES and SIDNEY BLUMGOLD, trustees of Local 338 Retirement Fund; RETAIL, WHOLESALE AND CHAIN STORE FOOD EMPLOYEES UNION RETIREMENT TRUST BOARD OF TRUSTEES, Administrator of Local 338 Retirement Fund; and LOCAL 338 RETIREMENT FUND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) The Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001, et seq. ("ERISA") provides for two official plan documents: the plan master document and the summary plan description ("SPD").

The Courts of Appeal have unanimously held that the terms of an SPD control over conflicting terms of the Plan document. The question presented is whether prejudice must be established before the terms of the SPD control over conflicting terms of the plan document.

(2) Congress adopted minimum accrual standards in ERISA to prevent plans from "backloading" benefits, i.e., designing accrual schedules that circumvent the vesting rules by causing the great preponderance of benefits to accrue only in the last years of employment.

The question presented is whether a court is free to disregard ERISA's clear statutory language that prohibits backloading and rely, instead, on its own "vague notions of a statute 'basic purpose.'"

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all parties to this proceeding.

Petitioner is an individual.

Respondents Emmanuel Laub, James Johnson, Mel Weitz, Harold Friedman, Jon Greenfield, Sam Pelz, Manuel Monaco, Hector Torres and Sidney Blumgold are individuals sued in their capacity as trustees of Local 338 Retirement Fund.

Respondent Retail, Wholesale and Chain Store Food Employees Union Retirement Trust Board of Trustees is the Board of Trustees of the Local 338 Retirement Fund and is sued in its capacity as plan administrator of the Local 338 Retirement Fund.

Respondent Local 338 Retirement Fund is a multiemployer pension plan subject to ERISA.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Cedarbaum, D.J.) granting respondents' motion for summary judgment (Appendix (Pet. App.") 10a-24a) is published at 2002 U.S. Dist. LEXIS 5106 (S.D.N.Y. Mar. 28, 2002). The court of appeals' opinion (Rakoff, D.J. (sitting by designation), joined by Van Graafeiland and B.D. Parker, Jr., JJ) affirming (Pet. App. 1a-9a) is published at 328 F.3d 68 (CA2 2003). The court of appeals' order denying rehearing and rehearing en banc (Pet. App. 25a-26a) is not published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on May 6, 2003, and denied rehearing and rehearing en banc on July 31, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. 1001, *et seq.*, relevant to this petition are reprinted in the Appendix at 27a-37a.

STATEMENT OF THE CASE

Petitioner is a retiree who worked in the supermarket industry his entire career. He retired in 1996 with 32.666 years of benefit service under the Local 338 Retirement Plan (the "Plan"). (Pet. App. 12a). Despite his lengthy service in the Local 338, petitioner received a pension that was significantly reduced by application of Plan provisions adopted in 1984 and 1994 (the "Freeze Provisions")(Pet. App. 4a, 3a, respectively).

Under the terms of the Plan, participants retiring in 1996 are entitled to a monthly pension calculated by multiplying $50 by the number of years of service in covered employment. (Pet. App. 3a). Pursuant to the Freeze Provisions, however, a participant's years of service prior to a one year break in service are multiplied by the unit benefit rate in effect at the time of the break, not the rate in effect at retirement. (Pet. App. 3a).

Petitioner incurred a break in service from 1974-1979. As a consequence, his pre-1974 years of service were multiplied by a unit benefit rate of $20, rather than the $50 rate in effect when he retired. Instead of being entitled to a pension of $1,633.30 ($50 x 32.666 years), petitioner was awarded a reduced pension of $1,033.30 ($20 x 20 years + $50 x 12.666 years)(Pet. App. 14a).

There is no dispute that in describing the retirement formula under the Plan, the SPD contains no description of the Freeze Provisions and provides no description of any potential effect of such Provisions. (Pet. App. 20a).

Petitioner contends that: (1) he is entitled to enforce the terms of the SPD which promise a benefit of $1,633.30 without any qualification; or alternatively, (2) the Freeze Provisions violate the minimum accrual standards of ERISA

§204(b)(1), 29 U.S.C. §1054(b)(1) and that he is entitled to a monthly benefit that is reformed to meet ERISA's minimum accrual requirements.

The basis of jurisdiction in the district court is ERISA §502(e)(1), 29 U.S.C. §1132(e)(2).

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW RELATING TO SPDs CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS

ERISA provides for two official plan documents; the SPD and the plan master document. *Bergt v. The Retirement Plan for Pilots Employed by Mark Air, Inc.*, 293 F.3d 1139, 1143 (CA9 2002). ERISA contemplates that the SPD "will be an employee's primary source of information regarding employment benefits." *Heidgerd v. Olin Corp.*, 906 F.2d 903, 908 (CA2 1990). In this regard, employers are required to provide participants with a copy of an SPD (not the plan master document). *Bergt*, 293 F.3d at 1143.

An SPD must describe the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." ERISA §102(b), 29 U.S.C. §1022(b). It must be "written in a manner calculated to be understood by the average plan participant and shall be sufficiently comprehensive to apprise the plan's participants and beneficiaries of theirs rights and obligations under the plan." 29 C.F.R. §2520.102-2(a). An SPD must "not have the effect of misleading, misinforming or failing to inform participants and beneficiaries." 29 C.F.R. §2520.102-2(b).

The controlling effect of an SPD vis-à-vis the plan master document is an issue of vital importance to the

administration of employee benefit plans because plan fiduciaries are required to act solely "in accordance with the *documents and instruments* governing the plan...." ERISA §404(a)(1)(D), 29 U.S.C. §1104(a)(1)(D)(emphasis added). *Bergt*, 293 F.3d at 1143. Plan fiduciaries, therefore, need clear and uniform judicial direction in resolving the inevitable conflicts that arise between a plan's two official documents.

A. THE CIRCUIT COURTS ARE SPLIT ON WHETHER A PLAINIFF MUST ESTABLISH PREJUDICE BEFORE THE TERMS OF AN SPD CONTROL OVER CONFLICTING TERMS OF A PLAN

The circuit courts have unanimously held that the terms of an SPD control over the conflicting terms of a plan.[1] This is because, as the Fifth Circuit held, "[a]ny other rule would be, as the Congress recognized, grossly unfair to employees and would undermine ERISA's requirement of an accurate and comprehensive summary." *Hansen v. Continental Insurance Company*, 940 F.2d 971, 982 (CA5 1991).

In contrast to the unanimity of the circuits in holding that the terms of the SPD control, the circuit courts have conflicting and irreconcilable holdings concerning whether a participant must first establish prejudice and/or reliance.[2]

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[1] *See Burstein v. Retirement Account Plan for Employees of Allegheny Health Education and Research Foundation*, 334 F.3d 365, 378 (CA3 2003)(survey of circuits).

[2] The First, Second, Fourth, Seventh, Eighth, Tenth and Eleventh Circuits require varying degrees of prejudice and/or reliance. *See, e.g. Mauser v. Raytheon Company Pension Plan for Salaried Employees*, 239 F.3d 51, 57 (CA1 2001)(must be some measurable prejudice which constitutes

In the case at bar, the Second Circuit held that the terms of the SPD did not control over the Plan because "the failure to inform [petitioner] of the freeze at no point prejudiced him."[3] (Pet. App. 9a). This holding cannot be reconciled

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detrimental reliance); *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103, 113 (CA2 2003)(must establish likely prejudice); *Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1478 (CA4 1996)(must demonstrate either reliance or prejudice); *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703, 711 (CA7 1999)(must show detrimental reliance); *Palmisano v. Allina Health Systems, Inc.*, 190 F.3d 881, 887-888 (CA8 1999)(must show significant reliance or possible prejudice); *Nance v. Sun Life Ass. Co.*, 294 F.3d 1263, 1272 (CA10 2002)(same); *Buce v. Allianz Life Ins. Co.*, 247 F.3d 1133, 1155-1156 (CA11 2001)(must demonstrate detrimental reliance).

The Third and Sixth Circuits require neither reliance, nor prejudice. *See, e.g., Burstein v. Retirement Account Plan for Employees of Allegheny Health Education and Research Foundation*, 334 F.3d 365, 380 (CA3 2003)(need not plead reliance); *Edwards v. State Farm Mutual Automobile Ins. Co.*, 851 F.2d 134, 137 (CA6 1988)(requires neither prejudice nor reliance).

The Fifth and Ninth Circuits have not definitively ruled on whether reliance/prejudice are required. *See, e.g., Hansen v. Continental Insurance Company*, 940 F.2d 971, 983 (CA5 1991)(reserved decision on prejudice/reliance to another day); *Bergt v. The Retirement Plan for Pilots Employed by Mark Air, Inc.*, 293 F.3d 1139, (CA9 2002)(does not specifically address the issue of prejudice/reliance, but holds that employer must bear burden of inaccurate SPD).

[3] After the Court of Appeals issued the decision in the case at bar, another panel within the Circuit created a standard that

with the holdings in the Third and Sixth Circuits, where showings of prejudice and/or reliance are not necessary.

Certiorari should be granted in order to resolve this conflict among the circuits. The issue has been considered by the Courts of Appeals for over ten years and is ripe for this Court's review.

B. THE SPLIT AMONG THE CIRCUIT COURTS IS DELETERIOUS TO EMPLOYEE BENEFIT PLANS WHICH ARE OFTEN NATIONAL IN SCOPE

Congress enacted ERISA because employee benefit plans were becoming increasingly interstate and there was a need for a uniform body of law. ERISA §2(a), 29 U.S.C. §1001(a). To promote uniformity, ERISA contains one of the most comprehensive preemption provisions in federal law. *Ingersoll-Rand Co. v McClendon*, 498 U.S. 133, 142 (1990)("Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law.").

The split among the circuits on the issue of prejudice undercuts this purpose. As the law now stands, petitioner who happened to live in New York, could not enforce the terms of the SPD because he could not establish that he was prejudiced by the inaccurate SPD. By contrast, a participant in the same plan with the same fact pattern, who happened to live across the Hudson River in the Third Circuit, would have been able to enforce the SPD over the conflicting

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varies from the one imposed herein. Under that standard, if a participant makes an initial showing of likely prejudice, the employer may rebut it through evidence that the deficient SPD was in effect a harmless error. *See Burke*, 336 F.3d at 113.

provisions of the Plan. Thus, two participants in the same plan with the same fact pattern would have been entitled to drastically different pensions. Petitioner was entitled to a pension of $1,033.30. Whereas, the similarly situated New Jersey resident would have been entitled to a pension of $1,633.30.

This disparity is not just an issue of confusion and inequity for plan participants, it creates great uncertainty for the employee benefit plans themselves. ERISA has a very liberal venue provision. ERISA §502(e)(2), 29 U.S.C. §1132(e)(2), permits a plan to be sued "in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found." The next similarly situated participant, will forum shop, and attempt to obtain jurisdiction and venue within the Third Circuit. As a consequence, when calculating pension benefits, a plan must not only consider the plan's benefit formula it must consider the impact of all possible venues.

Continuation of a prejudice/reliance standard also unduly increases the litigation burden for both litigants and the courts. In the affected circuits, courts are required to conduct factually intensive inquiries on issues of prejudice and reliance—both of which are extraneous to the pension obligation. Not only is this a waste of scarce judicial resources, it is contrary to years of Supreme Court ERISA jurisprudence. It is well established that ERISA participants cannot recover consequential damages. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985). It therefore makes no sense to make enforcement of an SPD dependent on whether a particular participant suffered unrecoverable consequential damages.

In sum, because of the split among the circuits, the benefits of some participants will be determined by the terms of an SPD, and the benefits of others in the same plan will be

determined by the terms of the Plan. A participant's pension rights should be dependent on the governing documents alone, not on a case-by-case basis and the mere happenstance of venue. This Court should determine once and for all the circumstances required to enforce the terms of an SPD.

II. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW RELATING TO ERISA's MINIMAL ACCRUAL STANDARDS VIOLATED THIS COURT'S WELL-ESTABLISHED RULES OF STATUTORY CONSTRUCTION

This Court has warned on numerous occasions that "vague notions of a statute's 'basic purpose' are inadequate to overcome the words of its text regarding the specific issue under consideration." *Mertens v Hewitt*, 508 U.S. 248, 261 (1993). "This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests -- not all in favor of potential plaintiffs." Id. at 262.

This Court held in *Harris Trust and Savings Bank v Salomon Smith Barney, Inc.*:

> In ERISA cases, "as in any case of statutory construction, our analysis begins with the language of the statute . . . . And where the statutory language provides a clear answer, it ends there as well."

530 U.S. 238, *citing*, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

The Second Circuit simply disregarded these established rules. Instead of starting with and conducting an analysis of the statutory language, the Court flippantly dismissed petitioner's statutory analysis by stating that petitioner's

argument "completely misapprehends the acknowledged purpose of the 133 1/3 percent test..." (Pet. App. 6a). Rather than citing to statutory provisions, the Court merely cited to the House Report (H.R. Rep. No. 93-807 (1974), *reprinted in*, 1974 U.S.C.C.A.N. 4639, 4688). Based on solely the legislative history, the Court concluded:

> In other words, the test applies to how a given plan operates at a given time and prevents it from being unfairly weighted against shorter-term employees; but it is irrelevant to across-the-board increases in benefit rates made at some future time on behalf of all current employees regardless of period of service. Indeed, it would be a strange rule that would prohibit a fund from making more than a one-third increase in its across-the-board benefit rate unless that rule were retroactively applied to all former employees; yet this would be the effect of plaintiff's interpretation. Accordingly, we conclude that defendants did not violate the 133 1/3 percent test by pro rating his monthly benefit in accordance with the Plan's separation provisions.

(Pet. App. 6a-7a).

In the case at bar, the statutory language is clear. There was no need to draw inferences from the legislative history. Contrary to the Second Circuit's holding (Pet. App. 6a-7a), ERISA §204(b)(1)(B), 29 U.S.C. §1054(b)(1)(B), specifically and unambiguously restricts the manner in which a plan sponsor can change its benefit formula. A plan sponsor can indeed increase its benefit formula prospectively for future years of service, but if that increase is also retroactive, as in the case at bar, that increase must apply to all years of service for all current employees, regardless

whether they suffered a temporary interruption in continuous service (as petitioner did).

The 133-1/3 test of ERISA §204(b)(1)(B) requires that "the value of the benefit accrued in any year may not exceed the value of a benefit accrued in any previous year by more than 33%." *Esden v Bank of Boston*, 229 F.3d 154, 167 (CA2 2000). All benefit formulas must satisfy this requirement unless one of the qualifications to §204(b)(1)(B) is satisfied, namely subsections (i) through (iv). In the case at bar, however, none of the subsections are applicable.

The only subsection that could even arguably be used to exclude the effect of the Freeze Provisions from 133-1/3 testing is subsection (ii),[4] which deals with plan amendments making "any change in an accrual rate." But, subsection (ii) explicitly states that an accrual rate change is disregarded for 133-1/3 testing purposes only if it "does not apply to any individual who is or could be a participant in the current year." An across-the-board rate increase applicable to current employees by definition applies to individuals who are participants in the "current year." As a consequence, the change cannot be disregarded and must satisfy the 133-1/3 test.

This is confirmed by 26 C.F.R. §1.411(b)-1(b)(2)(ii)(B), which provides examples of rates that will and will not be disregarded for 133 1/3% testing pursuant to subsection (ii). For instance, an increase in 1980 from 2% of compensation in 1980 to 3% in 1981, where the 3% rate is inapplicable in

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[4] Subsection (ii) provides:

> any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded.

1980 (the current year) will be disregarded and will satisfy the 133-1/3 test because the 3% rate does not apply to any individual who is or could be a participant in the current year. By contrast, where a plan's formula provides 1% of compensation for the first 10 years of compensation, and 1.5% of compensation for years of service thereafter, the formula will not be disregarded and will not satisfy the 133-1/3 test because the 1.5% rate could apply to an individual in the current year who has over 10 years of service.

In the case at bar, the across-the-board increase in the unit benefit rate to $50 in 1996 will not be disregarded pursuant to subsection (ii) because the $50 unit benefit rate applies to individuals who are participants in the "current year," i.e., 1996. As a result, it must, but cannot, satisfy the 133 1/3% test. In order to satisfy the 133 1/3% test, a plan must satisfy the test for "any individual." ERISA §204(b)(1)(B) provides in pertinent part:

> the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 1/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year.

(emphasis added). The Plan cannot satisfy the test for petitioner because he received $20 for his first 20 years of service, and $50 for his remaining 12.66 years of service. (Pet. App. 21a). The rate of accrual for his later service was impermissibly 250% greater than his earlier service. His benefit was therefore unlawfully backloaded.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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